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IN THE

Supreme Court of the United States

October Term 1970
No. ~~1823~~ 70-278

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* THE DEPARTMENT OF PUBLIC WORKS,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State California, Second Appellate District, Division One.

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THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* THE DEPARTMENT OF PUBLIC WORKS,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State California, Second Appellate District, Division One.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, affirming the judgment of the Superior Court for Los Angeles County, adverse to petitioners.

Introduction.

This is an action in eminent domain in which Petitioners contend that they have been denied a fair trial and due process of law, in that their trial counsel was held in contempt of court, four times in the jury's presence, concededly without justification, by a judge

who has since been adjudged insane and committed to a mental institution.[1]

Opinion Below.

The Opinion of the California Court of Appeal, Second Appellate District, Division One (*People etc. v. Glouner et al.*, 2d Civ. No. 34704) was certified for non-publication in the official reports, under Rule 976, California Rules of Court. A copy of said opinion is attached hereto as Appendix A. The issue sought to be reviewed herein, is discussed in that opinion, under the heading *Fair Trial* commencing at p. 18 of Appendix A.

Jurisdiction.

The judgment of the California Court of Appeal sought to be reviewed was filed and entered on February 19, 1971. A timely petition for rehearing was denied by that Court on March 17, 1971. A timely petition for hearing by the California Supreme Court was denied on April 14, 1971.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

---

[1]Petitioners respectfully request that this Court take judicial notice of the judgment and records in *People etc. v. Davis*, Los Angeles County Superior Court criminal case No. A544 783, in which the trial judge who presided over the instant trial was found insane following a 1969 knife attack upon his wife in front of their home, and was committed to a mental institution. These events were a matter of notoriety in California, as were the psychiatric findings (which are a part of the record in *People v. Davis, supra*) that Judge Davis had a long history of personal instability characterized by overindulgence in alcohol and exhibited anger while under the influence of alcohol, and that following his arrest he suffered from bizarre delusions.

Question Presented.

The sole issue presented herein is as follows:

Is a litigant's right to receive a fair trial consistent with due process requirements violated, where in an eminent domain action:

(a) The litigant's trial counsel is held in contempt of court four times in the jury's presence,

(b) The contempt holdings are unjustified, and conceded to be such, and the trial judge admits that he was "teed off" when he held counsel in contempt,

(c) Trial counsel is forbidden to discuss the events giving rise to the "contempts" in his summation to the jury, and

(d) The unjustified contempt holdings are vacated before they can be reviewed on the merits, by the appellate courts, but the jury is not told of their vacation before rendering a verdict.

Constitutional Provisions Involved.

The pertinent constitutional provisions involved are the due process clause of Section 1 of the 14th Amendment:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .'

as well as the just compensation clause of the 5th Amendment:

> ". . . nor shall private property be taken for public use, without just compensation."

Statement of the Case.

This is an eminent domain case involving a partial taking of petitioners' land in northern Los Angeles County for a freeway. The events sought to be reviewed took place in the midst of a six-week jury trial in which the just compensation due petitioners was sought to be determined.

There were two separate incidents. In the first one, condemnor's appraiser, George Fisher, was being cross-examined, and the following occurred [Rep. Tr. p. 1548 *et seq.*]:

> "Q. [by Mr. Fadem] As a matter of fact, you did an income study on the motel on the subject property, didn't you?
>
> A. No.
>
> Q. Would you look at your appraisal report, the copy that I have been handed, which bears the initials of the judge pro tem. presiding at the pretrial conference, Richard Barry.
>
> The Court: Mr. Fadem, let's not interject unnecessary matters into your question.
>
> Mr. Fadem: I am only trying to identify—
>
> The Court: Now, we don't have to have that, Mr. Fadem.
>
> Mr. Fadem: I don't understand what has troubled the Court, but I—
>
> The Court: The jury is instructed to disregard anything about what happened at the pretrial conference.
>
> Mr. Fadem: I made no—
>
> The Court: You are not going to interject anything more of that nonsense.
>
> Mr. Fadem: I object to your Honor's characterizing whatever I have done as nonsense. I think

that that is detrimental to my position in this courtroom. It interfers with my effectiveness in the presentation of the case.

The Court: You interjected, Mr. Fadem. Now, let's just ask questions.

Mr. Fadem: Your Honor's referring to my words as nonsense, I ask the Court's apology for. My words were not nonsense, and were appropriate to the subject of the question.

The Court: Mr. Fadem, there will be a $25 fine right now.

We will take a recess until 2:00 o'clock. I find you in contempt of court, Mr. Fadem.

Mr. Deen: The jury is excused, your Honor?

The Court: The jury is excused until 2:00 o'clock.

Mr. Fadem: I have not been in contempt of court, your Honor.

I would point out that as your Honor left the bench your face was red, your voice was rising, and you were shouting at me for no reason whatsoever.

(A recess was taken until 2:00 p.m. of the same day.)"

When court reconvened (in chambers) Petitioners promptly made a motion for mistrial, *inter alia* on the grounds that in light of foregoing events and the trial judge's highly emotional conduct, a fair trial could not be had. The motion was denied on the stated ground that it would be unfair and inconvenient to retry the case. (There had been an earlier mistrial declared *sua sponte* by another judge).

The second incident took place nine days later, when condemnor's second appraiser, Lewis Miller, was being cross-examined. [Rep. Tr. p. 2714 *et seq.*]:

"Q. [by Mr. Fadem] Now, when you find a property reselling within a relatively modest period of time, are those the most helpful sales in determining the trend of values?

Mr. Deen: Objection; the form of the question is unintelligible in that it does not relate to a specific property.

The Court: Overruled.

The Witness: If I remember the question correctly, from any two sales or any one set of sales you cannot determine a trend.

An appraiser has to consider what happened in the situation of Sale 3, what happened in the situation of Sale 4. The general trend may have been downward, but the specific property may have gone up in value because of, for example, Sale 4, the extension of Parker Road became an established fact, and this had the impact of bringing traffic right to Sale 4 in the marketplace. But this didn't mean that there was a trend that could be applied. As I mentioned before, it would not apply, say, to a property a half a block down the street or half mile down the street nor around the corner.[2]

Q By Mr. Fadem: Do you know what the last question asked of you was, Mr. Miller?

---

[2]Please note at this point that this volunteered dissertation by Mr. Miller about Sale 3, Sale 4, Parker Road and the impact of traffic on Sale 4, was non-responsive to the simple, categorically answerable question of whether resale of *a* property within a relatively modest period of time was most helpful in determining the trend of land prices.

A. Yes.

Q. Would you tell us?

A. I thought you asked—

Mr. Deen: May we have the question reread?

Mr. Fadem: No, I want to find out if the witness thought he was answering the question. I think it would be helpful to the jury's judging his credibility.

The Court: Mr. Fadem, that last remark is unnecessary and uncalled for.

Would the reporter read back the question, please?

Mr. Fadem: Excuse me, your Honor, I would like to go on the record—

The Court: Not in front of the jury, Mr. Fadem.

Mr. Fadem: Your Honor's comments to me were in front of the jury, and I think were uncalled for.

The Court: All right, Mr. Fadem, you are cited again for contempt. You don't argue back to the Court.

Mr. Fadem: I have a duty to represent my clients—

The Court: You may, but I don't—

Mr. Fadem: That duty requires my being heard when there are matters that must be heard.

The Court: I just explained to you you could explain it outside the presence of the jury.

Mr. Fadem: Your Honor's damage to my client's cause was in front of the fury.

The Court: No, it wasn't damaging at all, Mr. Fadem.

Mr. Fadem: I deem it otherwise, your Honor, and I request again the Court apologize—

The Court: Mr. Fadem—

Mr. Fadem:—because your Honor—

The Court: Mr. Fadem, again I cite you a double time for contempt this afternoon. I explained to you before that I didn't want any more arguments in front of the jury, so that is two.

We will have further hearing on that at the close of the case.

Now would the reporter read back the question again?

Mr. Fadem: I would like to point out for the record that your Honor was raising his voice and pointing at me.

The Court: That is the third citation for contempt.

Mr. Fadem: And is doing it again.

The Court: Right.

(Record read.)"

Mr. Fadem, immediately after the first "contempt" petitioned the California Court of Appeal for review by certiorari.[3] However, while the petition was pending and before it was acted on, the trial judge vacated the order of contempt, thereby rendering the petition moot. Accordingly, it was dismissed, and Mr. Fadem never got the opportunity to have the invalidity of these "contempts" adjudicated on the merits.[4]

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[3]Under California law, orders of contempt are final, conclusive, and non-appealable (Cal. Code Civ. Proc. §1222 and §904.1(a)(2)), and as such are reviewable only by the prerogative writ of certiorari.

[4]In the instant appeal, respondent conceded that the trial judge's words were ill-advised, and that Mr. Fadem's acts were not sufficient to constitute contempt.

When the orders of contempt were vacated, the jury had not yet returned its verdict. Nonetheless, the jury was not informed of such vacation, notwithstanding that the orders were made in the jury's presence, and notwithstanding, that counsel was not permitted to discuss the events said to give rise to the "contempts" in his summation to the jury.

Following the return of a verdict by the jury, a judgment was entered and appealed from. This petition seeks to review the affirmance thereof by the California Court of Appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

In these days of increasing courtroom disruption, Petitioners would be belaboring the obvious in arguing that determinations of due process issues arising out of the application of the judicial powers of direct contempt, are important.

It seems to Petitioners that equally important in this climate, is the protection which our legal tradition extends to advocates who are at times faced with the delicate task of having to faithfully represent their clients before a hostile and over-reacting judge. See *Holt v. Virginia,* (1965) 381 U.S. 131, *Cooke v. U.S.,* (1925) 267 U.S. 517.

The danger is that *some* judges may act too hastily and may invoke the extreme measure of contempt when none is called for. And that is exactly what happened in the case at bench. Here, the trial judge himself conceded that he was "teed off" [his exact phrasing; Reporter's Transcript, p. 3256] when he held Petitioner's counsel in contempt. This alone would render any purported contempt findings constitutionally invalid. (See *In re Murchison,* (1955) 349 U.S. 133, *Offutt v. U.S.,* (1954) 348 U.S. 11; *Mayberry v. Pennsylvania,* (1971) ..... U.S. ..... [27 L. Ed. 2d 532, 540].)

Just as the intentionally disruptive litigant must be restrained to protect the adjudicatory process (*Illinois*

v. Allen, (1970) 397 U.S. 337), so must the overstepping judge (*Holt, Cooke, supra*). Otherwise, due process is denied to litigants, and justice is not achieved.

Whether by the standards of pertinent cases decided by this Court or the California courts,[5] the conduct of Petitioners' trial counsel in the instant case constituted no contempt; it was appropriate advocacy directed at proper representation of Petitioners. On appeal Respondent conceded as much.

Yet, Petitioners' counsel was held in contempt *four times.* To make matters worse, even though each asserted contempt holding was in the jury's presence, the jury had no opportunity to learn that the trial judge vacated the spurious contempts rather than face their review on the merits by California reviewing courts.

Petitioners thus had their cause determined by a jury laboring under the belief that Petitioners' trial counsel had been in contempt of the court. That this was prejudicial to petitioners is obvious and such prejudice has been recognized by this Court repeatedly. *Mayberry, supra,* [27 L. Ed. 2d at 539], *Offutt, supra,* 348 U.S. at 13; also see Judge Frank's celebrated opinion in *Skidmore v. Baltimore & O. R. Co.,* (1948, 2d Cir.) 167 F. 2d 54, 61-62, discussing the familiar phenomenon of juries often deciding cases on the basis of what they think of the advocates.

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[5]See *e.g. Gallagher v. Municipal Court,* (1948) 31 Cal. 2d 784, 192 P. 2d 905; *Cooper v. Superior Court,* (1961) 55 Cal. 2d 291, 359 P. 2d 274; *In re Hallinan,* (1969) 71 Cal. 2d 1179, 459 P. 2d 244.

If holding a misbehaving lawyer in contempt in the jury's presence is prejudicial to his clients—as noted in *Offutt* and *Mayberry*—then how much greater the prejudice when the contempts are unwarranted and later vacated, but their vacation is kept from the jury. The courts have not permitted judgments tainted by such prejudice to stand. See *e.g., Peckham v. U.S.*, (1953, D.C. Cir.) 210 F. 2d 693,[6] which makes it clear that an adjudication tainted by an imbroglio between the attorney and the trial judge is prejudicial *to the client*, and cannot stand. It is, after all, the adjudication of the *client's* rights that the courts undertake, not resolution of lawyer-judge differences.

Petitioners note—as they must—that their arguments have not persuaded the California Court of Appeal whose opinion leaves little doubt as to that Court's hostility to Petitioners' trial counsel. Nonetheless, Petitioners submit that an objective reading *of the record* will satisfy this Court that such hostility is unwarranted and unsupported.[7] Surely, this is hardly the first time

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[6]Please note that Peckham's counsel was Mr. Offutt whose contempt was the subject of this Court's decision at 348 U.S. 11.

[7]To illustrate the unwarranted nature of the opinion's vehemence: the opinion asserts that counsel ". . . . in effect accused the trial judge of lying with respect to statements made by the judge regarding the demeanor of counsel in court." (Appendix A, p. 20). In fact, the trial judge who had been acting in an angry and emotional manner, accused counsel of raising his voice and said: "It is too bad they don't put that on video tape." Counsel responded that in fact the court reporter was using a tape recorder and there was available a magnetic tape recording of the voices of the judge and counsel, which would disclose that it was the trial judge, not counsel, who raised his voice. Counsel promptly requested that this tape be impounded to provide the reviewing courts with an objective record of *who* raised his voice. [Rep. Tr. p. 1566.] The trial judge refused to impound the tape. Does that not speak for itself?

(This footnote is continued on the next page)

that a petitioner with a meritorious cause has come before this Court, after his arguments have failed to persuade the lower courts.

Regrettably, in the context of the abbreviated presentation in this petition—commanded by Rule 23—a full analysis of the record cannot be undertaken. Therefore, Petitioners, for purposes of this petition will assume that the lower Court's critical assessment of the conduct of trial counsel is sustainable. But even assuming Petitioners' counsel misbehaved as asserted in the opinion, why wasn't he held in contempt for his acts that the Court of Appeal characterized as "reprehensible" and which occurred in chambers? Why hold him instead in contempt *in the jury's presence* over matters whose impact the court below itself characterized as "trivial"? Isn't that deliberate punishment of *the clients* for something *they didn't do?*

Moreover, if counsel's conduct was as "reprehensible" as the opinion asserts, why vacate the orders of contempt? Why not let them stand to be reviewed, and as a warning to other counsel who might be tempted to misbehave?

In short, even on its own dubious premise, the opinion brought before this Court for review gives every indication of glaring weakness, logically, pragmatically and constitutionally. All of which only underscores the fact that whatever the court below may have thought of Petitioners' trial counsel, Petitioners were denied a fair trial.

Should the Court desire further substantiation of Petitioners' position, there is attached hereto as Appendix B. Petitioners' briefing [of the inaccuracies contained in the opinion] taken from their Petition for Hearing in the California Supreme Court.

And this brings to the fore an additional element which strongly militates in favor of relief being granted by this Court. Unlike cases such as *Offutt, Sacher* or *Mayberry* in which the petitioners were properly chargeable with wrongdoing, the instant Petitioners are not in that category. Petitioners here are law-abiding citizens, who have not even been accused of anything: not criminal, nor negligent, not even non-feasance. The reason they are in court at all is that they disagreed with the California Division of Highways as to the value of their land which the Division took for another freeway.

Surely in such an impersonal dispute, in which a concededly blameless citizen seeks for himself his constitutional due process guarantee of just compensation and invokes the adjudicatory process of the courts in ". . . a sober inquiry into values, designed to strike a just balance between the economic interests of the public and the landowner,"[8] the courts should painstakingly see to it that he receives his proper measure of procedural due process. ". . . [J]ustice must satisfy the appearance of justice." *Offutt, supra,* 348 U.S. at 14. And this carries added force in a case such as this, when the courts' jurisdiction is invoked to secure *just* compensation which—as this Court repeatedly noted—evokes ideas of "fairness and equity."[9]

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[8]This apt description of the essence of a condemnation trial was drawn in *Sacramento etc. Drainage Dist. v. Reed,* (1963) 215 Cal. App. 2d 60, 69; 29 Cal. Rptr. 847.

[9]*United States v. Virginia P. & E. Co.,* (1961) 365 U.S. 624, 631; *United States v. Commodities Trading Corp.,* (1950) 339 U.S. 121.

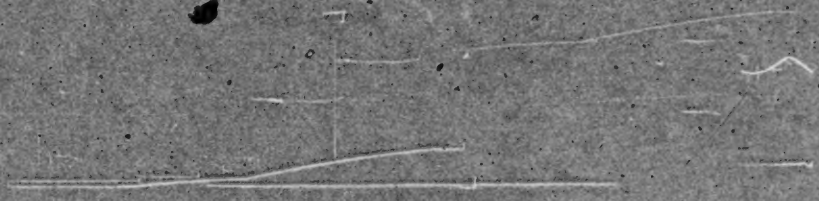
Conclusion.

> "But that there be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever." *Sacher, supra,* 342 U.S. at 13.

Petitioners respectfully submit that this Court's aid is needed in the case at bench. They pray that this petition be granted.

Respectfully submitted,

JERROLD A. FADEM,
GIDEON KANNER,
Attorneys for Petitioners.



APPENDIX.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, acting by and through the Department of Public Works, Plaintiff and Respondent, v. Donald C. Glouner, Muriel J. Glouner, Gary D. Glouner and Patricia Ann Glouner, and Shell Oil Company, a corporation, Defendants and Appellants. Civil No. 34704, S. C. No. 879771, (Consolidated).

Filed: Feb. 19, 1971.

APPEALS from a judgment of the Superior Court of Los Angeles County. Lloyd S. Davis, Judge. Affirmed.

Fadem & Kanner and Gideon Kanner for Defendants and Appellants Glouner.

E. A. Radford and B. G. Warren Defendant and Appellant Shell Oil Company.

Harry S. Fenton, Chief Counsel, Joseph A. Montoya, Richard L. Franck, William H. Peterson, and Robert W. Vidor for Plaintiff and Respondent.

THE COURT:

Appellants Glouner (we use "Glouner" collectively to refer to all appellants of that name) and Shell Oil Company are two of the defendants in an eminent domain proceeding tried before a jury. They appeal from the judgment entered on the jury verdict.

Appellants Glouner were the fee owners of a parcel of property in Los Angeles County near Castaic Junction. Appellant Shell was a lessee of a portion of the property. On appeal from the judgment, appellants

Glouner contend that the trial court erred: (1) in denying compensation for impairment of access; (2) in not awarding compensation for the taking of an abandoned roadway; (3) in preserving the date of issuance of the summons as the valuation date for the property condemned although trial was not commenced within one year of that time; (4) in issuing a protective order against the taking of a deposition; and (5) in denying them a fair trial by holding their counsel for contempt in the presence of the jury. Appellant Shell contends that the trial court erred in preserving the valuation date. As a matter of convenience, we discuss separately the facts and law bearing on each of the issues raised by those contentions.

Limitation of Access. Prior to the filing of the complaint in eminent domain, the property owned by appellants Glouner was bordered on the east by Golden State Highway. Glouner's predecessors in interest had conveyed the right of access to Golden State Highway to respondent by the deed which stated: "The conveyance of Parcel 1 herein is made for the purposes of a freeway and grantor hereby releases and relinquishes to the grantee any and all abutter's rights of access appurtenant to the grantor's remaining property, in and to said freeway, EXCEPTING and reserving, however, to the grantor herein, its successors or assigns, the right of access to said freeway over and across the southeasterly 100 feet of the northwesterly 480.01 feet of that certain curve above described as having a length of 1380.60 feet." At the time of the conveyance, Golden State Highway was a divided road referred to as "limited access freeway," "the Golden State Freeway," and "limited access expressway." The reservation of access to Glouner's predecessor in interest was

in accord with a purpose to control the locations where entrance or exit to the highway could be obtained. The reserved 100-foot strip was at the end of Halsey Canyon Road which at all pertinent times has bisected the property running in an east-west direction.

After the taking of property by the emininent domain proceeding, the property retained its access opposite Halsey Canyon Road to what is now known as "Old Golden State Highway" which became a frontage road along a new freeway. The frontage road is a two-way undivided highway with access to the new freeway at a point 2,200 feet to the north and 8,100 feet to the south. Over objection, appellants Glouner presented evidence that the change in highway alignment converting Golden State Highway to a frontage road substantially depreciated the value of property which fronted on that highway. The trial court ruled that there had been no substantial impairment of access as a result of the project and denied damages for the consequent depreciation in value. Appellants Glouner contend on this appeal that the ruling was erroneous.

Resolution of the issue presented by Glouner's contention depends upon constructiion of the reservation of access in the deed from Glouner's predecessor in interest to the state. If that deed reserved access to the freeway as eventually constructed on the property condemned in this action, Glouner is entitled to compensation for the value of the access taken. (*People ex rel. Dept. Pub. Wks. v. Ward,* 258 Cal.App.2d 15 [65 Cal.Rptr. 508].) Conversely, if the deed reserved access only to the highway which ultimately became the frontage road known as "Old Golden State Highway" damage caused by the change in traffic flow is not compensable. (*People ex rel. Dept. Pub. Wks. v. Beck-*

er, 262 Cal.App.2d 634 [69 Cal.Rptr. 110], hearing denied Supreme Court, and cases there cited.) The trial court construed the reservation as one of access to Golden State Highway only. That conclusion cannot be reversed by us on appeal. The record discloses that, on the date the conveyance containing the reservation was executed, Golden State Highway, although technically a limited access expressway, was called a "freeway." Appellants point to no evidence that the the time of the conveyance and reservation the present freeway was planned or contemplated. Whether we treat the matter as a construction of an instrument based in part upon substantial extrinsic evidence and thus binding upon us or whether we construe the instrument independently, we reach the same conclusion. The word "freeway" used in the reservation referred to Golden State Highway. Construction of the meaning of the reservation was a matter of law for the trial judge. (*Breidert v. Southern Pac. Co.,* 61 Cal.2d 659, 664 [39 Cal.Rptr. 903, 394 P.2d 719].) We conclude, therefore, that the trial court's action in not permitting the jury to assess damages for impairment of access was correct and that appellant's contention must be rejected.

Compensation for Abandoned Roadway. The property here involved abutted an abandoned road to the southwest. An original 60-foot highway easement to the road had been conveyed by Newhall Land to the State of California on May 10, 1915. On March 8, 1923, Newhall conveyed the property abutting the roadway to Randalls. The legal description incorporated in 1923 deed reads in part: "to a point in the northeasterly line of that section of the State highway known as the Ridge Route; thence along the

northeasterly line of said highway north fifty-five, fifty west," etc. Subsequent conveyances in the chain of title to appellants Glouner preserve the same description.

In 1932, the state abandoned the 60-foot strip conveyed by the 1915 deed from Newhall except for a portion within a subsequently acquired right of way. The trial court ordered that the value of the strip be excluded in determining the award in condemnation. Appellants Glouner contend: (1) they became the owners of the abandoned strip when the property abutting the former roadway was conveyed to them; and (2) irrespective of lack of ownership of the strip by any party named in the eminent domain proceeding the trial court erred in not including the strip in the property valued by the jury.

Appellants Glouner base their claim to ownership of the 60-foot strip upon Civil Code section 831 which provides: "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown" and Code of Civil Procedure section 2077 which states: "The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it: . . . [4.] When a road . . . is the boundary, the rights of the grantor to the middle of the road . . . are included in the conveyance, except where the road . . . is held under another title." By their terms, Civil Code section 831 and Code of Civil Procedure section 2077 are presumptions inapplicable where rebutted by substantial evidence. (See *Anderson v. Citizens Savings etc. Co.*, 185 Cal. 386, 397 [197 P. 113].) The presumption that a conveyance of land bounded by a street includes land to the center of the

street is rebutted where the description of the property conveyed utilizes the side line of the street rather than referring to the street itself as a monument. (*Speer v. Blasker*, 195 Cal.App.2d 155, 159 [15 Cal.Rptr. 528]. The conveyance considered by us here describes the boundary of the property as "along the northeasterly line of said State Highway." It thus utilizes the side line of the street rather than the street itself as a monument. We conclude, therefore, that the predecessor in interest of appellants Glouner acquired no interest in the now abandoned strip. There was no interest to be conveyed to appellants and their claim to ownership must be denied.

Appellants Glouner contend also that irrespective of their lack of interest in the strip the court was required to include it in the property valued by the jury because the trial court, at respondent's request, was trying the issue of value pursuant to Code of Civil Procedure section 1246.1. That statute provides that where requested by the condemnor, the amount of the total award for the property condemned must be determined prior to the apportionment of the interests of the various owners in the condemned property.

We conclude that if the trial court erred in proceeding as it did, the error was invited by appellants Glouner. The issue of ownership of the strip was presented to the trial court without objection. The ground of reversal here asserted was not presented at trial. To the contrary, appellants Glouner introduced evidence of the chain of title purporting to support their claim to title to the strip. The case having been tried on the theory that title was in issue, with appellants' consent, appellants cannot now claim that the trial court erred in so doing.

Preservation of Valuation Date. Respondent filed its complaint in eminent domain to acquire a portion of the property on March 2, 1966, and summons was issued that same day. Shell answered the complaint on May 12, 1966. Appellants Glouner filed a purported answer on March 28, 1966. Respondent demurred to Glouner's answer stating as one of its grounds the failure of the answer to designate "the larger parcel" which Glouner contended encompassed a smaller area constituting the property condemned. On April 19, the demurrer was sustained and Glouner was granted 15 days to amend their answer. Glouner filed a notice of motion to set aside an order for immediate possession previously granted by the trial court. That court denied the motion on April 26. On April 28, 1966, Glouner noticed a motion for an extension of time to plead so that they might seek an extraordinary writ mandating the trial court to set aside the immediate possession order. Over the objection of respondent, the trial court granted an extension of time to plead to "28 days from April 28, 1966." By stipulation, the time was further extended to 10 days after the California Supreme Court had determined Glouner's application for a writ. Glouner's petition for an extraordinary writ was denied by the Court of Appeal and hearing on that ruling was denied by the Supreme Court on June 1, 1966. The answer was not filed when due on June 11. On June 13, Glouner moved for a further extension of time to answer. The motion was denied. Glouner filed their amended answer on June 13 still not describing "the larger parcel." On July 13, 1966, the case was set for an initial pretrial conference on September 28, 1966. On August 1, Glouner filed a "Notice of Appeal to the United States Supreme Court" stating that they

would raise in that tribunal the unconstitutionality of Code of Civil Procedure section 1243.5, the California statute dealing with immediate possession by the condemnor. On Glouner's application, their time to docket the case in the United States Supreme Court was extended to November 7, 1966. On September 28, the date originally set for the first pretrial conference, it was continued to September 30 at the request of Glouner with the consent of other counsel. On September 30, Glouner moved for a further continuance of the pretrial conference pending determination of their appeal to the United States Supreme Court.[1] The motion was denied but the pretrial was nevertheless continued to October 28 because of calendar congestion.

The first pretrial conference was held on October 28. The court set a final pretrial hearing for December 21, 1966, and trial for January 17, 1967. The first pretrial conference order recites that there is a dispute with respect to the description of "the larger parcel" and that, "This issue, if it exists, may be resolved by the appraisals of the parties. . . ." The order requires that the parties submit their respective appraisal reports for exchange (if found comparable) on or before five days before the final pretrial. The order requires that the appraisal reports state their respective version of the description of the "larger parcel of which it [the property condemned] is a part. . . ." The parties were also ordered to submit points and authorities "that will include their factual contentions with respect to the dispute concerning the description of the 'larger parcel.'" Respondent's contentions with respect to the

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[1]The United States Supreme Court apparently denied the petition.

"larger parcel" issue are set forth in the joint pretrial statement.

On November 14, 1966, respondent filed and served on Glouner nine interrogatories. The first eight deal with economic data concerning Glouner's ownership and operation of the condemned property. The ninth asks Glouner's contentions with respect to the "larger parcel." Glouner responded on November 28 with an objection that the first eight interrogatories were immaterial because the actual use of the property was not its highest and best use and an objection to the ninth because it sought "legal theory" rather than facts. Respondent moved for an order to compel further answers to the interrogatories. The motion was granted on December 5, the court limiting the response to interrogatory nine to a "legal description" of the larger parcel. Appellants Glouner were required to file their further answers on or before December 15. Glouner's purported further answers to the interrogatories were filed on December 20 but interrogatory nine was still not answered. In response to that interrogatory, Glouner stated that the legal description of the larger parcel was unavailable until determined from a further appraisal and that the description depended upon an appraisal which was not yet complete.

On December 21, respondent filed a "Motion to Preserve the Valuation Date" of March 2, 1966, and to continue the pretrial set for January 3, 1967, to April 28 because of the "dilatory" conduct of Glouner with respect to discovery. On December 22, respondent filed a motion to compel further answers to interrogatories seven, eight, and nine, and for sanctions for disobedience of the earlier court order compelling answers. The motion to compel further answers was

granted by department 63 of the superior court which also denied respondent's prayer for monetary sanctions. Department 63 transferred hearing on that portion of the motion which sought sanctions in the form of preservation of the valuation date of hearing in the department of the judge who had presided over the prefrial proceedings and before whom the motion noticed on December 21 was pending for hearing on January 3, 1967. That judge, on January 3, 1967, granted respondent's motion to continue the final pretrial hearing to April 28, 1967, and continued the trial date to May 15. He ordered that points and authorities be furnished on the motion to preserve the valuation date, requiring that respondent supply its points and authorities within 10 days and Glouner 10 days thereafter. The judge ordered that "upon receipt of all briefs matters (3) and (4) [preservation of the valuation date] will stand submitted." Glouner finally filed their further answers to the interrogatories on January 3.

On January 5, Glouner noticed the deposition of the appraiser for respondent to be taken January 16. They also served a subpena duces tecum re deposition on the appraiser seeking, among other things, his appraisal report. In their application for the subpena duces tecum, Glouner recited that the information was necessary to establish that the delay in bringing the case to trial was the fault of respondent. On January 10, respondent noticed a motion for a protective order against the taking of the deposition upon the ground, among others, that the notice of the deposition was dilatory and oppressive. The protective order was granted on January 16. On January 30, the court ruled on the motion to preserve the valuation date previously submitted by it. Its order recites, "continuance of pre-

trial and trial caused by delay of defendants, Glouner; that as result thereof, trial is not set within one year from issuance of summons." The court therefore ordered that the date of valuation remain March 2, 1966, the date of issuance of summons.

On December 22, 1966, appellant Shell Oil directed interrogatories to respondent. They were answered on January 12, 1967. On January 30, appellant Shell's motion for a date of valuation separate from that applicable to appellants Glouner was denied. On April 19, Glouner noticed a motion to be relieved from that portion of the pretrial order requiring an exchange of appraisal date on the ground that the Los Angeles Superior Court policy memorandum requiring such an exchange is unconstitutional. The motion was denied.

Appellants Glouner contend that the trial court prejudicially erred in entering its order of January 30 preserving the valuation date of March 2, 1966. Appellant Shell contends that the court erred in denying its motion for a separate valuation date.

Code of Civil Procedure section 1249 states: "For the purpose of assessing compensation and damages [in eminent domain] the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value in that date shall be the measure of compensation for all property to be actually taken . . . *provided*, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of trial. . . ."

Summons in the case at bench was issued on March 2, 1966, and the case was originally set for trial on

January 17, 1967, within one year. The case first proceeded to trial on July 6, 1967. The trial court on its own motion declared a mistrial about three weeks later. The trial at which value was eventually determined began on January 26, 1968. While trial thus did not occur within one year from the date of issuance of summons, the trial court, by its order of January 30, found that a continuance of pretrial and trial was caused by delay of "defendants, Glouner," and ordered that the date of issuance of the summons be utilized as the date of valuation. Appellants Glouner argue that: (1) no fault on their part caused the delay of the trial; and (2) in any event any fault on their part was corrected by their eventual answer to interrogatories on January 3 at which time there remained about 60 days during which the trial could be set.

The record amply supports the trial court's finding that delay caused by the fault of appellants Glouner prevented a pretrial on the date originally set (Janutrial date set for January 17. From the time of reary 3) and hence necessitated a continuance of the spondent's sustained demurrer to their original answer, appellants Glouner knew that they would be required to set forth their contention concerning "the larger parcel." They were again ordered to do so in the pretrial order. They did not do so. When served with an interrogatory on November 14 requesting that they describe the larger parcel, appellants Glouner responded with what can only be construed as the frivolous objection that the interrogatory was improper because it called "for legal theory." (*Universal Underwriters Ins. Co. v. Superior Court,* 250 Cal.App.2d 722 [58 Cal.Rptr. 870].) When ordered by the court on December 5 to serve and file an answer to the

interrogatory no later than December 15, appellants Glouner finally responded on December 20 with the statement to the effect that they did not know what their contention would be and that the contention would depend upon the outcome of an appraisal still not completed.

There is sufficient in the record to support a factual inference by the trial court that Glouner's conduct in response to the interrogatory was in bad faith, intended to avoid the proper purposes of civil discovery and the obligations of pretrial. Since definition of the issue of the "larger parcel" had been delineated as a major issue in the case at the first pretrial order, the trial court could also properly conclude that the conduct of appellants Glouner had made it impossible to conduct an effective final pretrial conference on January 3. The record thus amply supports the trial court's determination that fault of appellants Glouner necessitated a continuance of the final pretrial conference if it was to be effective and a consequent vacation and continuance of the initial trial date of January 17 to a date after the new time set for the final pretrial.

We cannot accept the argument of appellants Glouner that, in spite of their fault which caused a continuance of the original final pretrial conference a consequent vacation of the trial date set within one year of the issuance of summons, there was an obligation to reset the trial within the 60 days remaining from the time that appellants Glouner eventually complied with the court order re discovery to the end of the one year period. While eminent domain proceedings are entitled to priority, that priority does not require that a trial court ignore all other cases pending

on its calendar in order to grant an almost immediate trial date to a party whose fault has caused the vacation of a trial setting. In essence, appellants Glouner are arguing that the court should have ignored the rights of parties and counsel in other cases who were diligent in their preparation for trial in order to accommodate them although they and their counsel had been flouting the rules governing discovery and pretrial. Their argument must be rejected.

Appellant Shell contends, also, that the trial court erred in preserving the valuation date as that of the issuance of summons as to it, although the case was not tried within one year. Shell's contention presents a much more difficult question. The trial court found no fault attributable to appellant Shell which caused the delay in the trial. Shell was in the unhappy position of having been joined as a defendant with unrelated parties who were guilty of fault. The issue is whether a party in that position is bound by the conduct of his obdurate codefendants with respect to the fixing of a date of value where the trial is conducted pursuant to Code of Civil Procedure section 1246.1.

Resolution of that issue is made difficult by a basic inconsistency between sections 1246.1 and 1249 of the Code of Civil Procedure. The former section provides that "Where there are two or more estates or dividend interests in the property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceedings the respective rights of such defendants in and to the award shall be determined. . . ." Section 1249 provides in effect that if trial of an eminent domain proceeding is delayed past

one year from the date of issuance of summons, the date of valuation of the condemned property shall be the date of trial rather than the date of summons "unless the delay is caused by the defendant." Thus section 1246.1 provides for the valuation in one proceeding of the entire property in which there may be different interests owned by different defendants in eminent domain. Of necessity, it speaks in the plural. Section 1249, dealing with date of valuation, speaks in the singular—delay caused by the defendant. In the context of the case at bench, section 1249 appears to entitle Shell, a defendant which did not cause delay, to valuation of the property condemned computed as of the date of trial. Section 1246.1 however, requires that at the request of the state the entire property condemned, including Shell's leasehold interest, must be valued as one lump.

Our research has disclosed no precedent reconciling the operation of the two conflicting statutes. The briefs cite us to none. We can conceive of four possible procedures: (1) the preservation of the date of issuance of summons in valuing the interests of all defendants; (2) the preservation of that date for the purposes of valuing the property as a whole with the lessee being permitted to compute the value of his interest as of the date of trial when that total value is apportioned between the lessor and lessee; (3) the presentation to the jury of two sets of valuation data and opinion, one valuing the whole of the property as of the date of issuance of the summons in order to compute the compensation of the fee owner, and the other valuing the property as of the date of trial for the purpose of computing compensation to the lessee; (4) a rule which permits the defendant who has not caused the

delay to move to set aside the order requiring the trial to proceed pursuant to Code of Civil Procedure section 1246.1 and putting the plaintiff condemnor to its election either to proceed pursuant to that section with value determined as of the date of trial or to proceed with separate valuation determinations of the various interests in the property condemned.

The first possible procedure is manifestly unfair to the defendant who has not caused delay. To the extent the condemnor benefits from the earlier valuation date, that defendant is in effect penalized for the sins of another. We, therefore, reject that possibility. The third possible solution (the presentation of evidence covering two different dates of valuation) seems contrary to the express dictates of Code of Civil Procedure section 1246.1. If two different valuation dates are used, the property is not valued as a whole. Moreover, that third possibility seems eminently impractical. It introduces an undue complexity into the already difficult task of a jury in an eminent domain proceeding. That jury of twelve laymen, presumably unskilled in property matters, is called upon to arrive at an esoteric concept called fair market value based upon what is usually widely conflicting testimony from witnesses who are part expert and part advocate. To complicate the task of the jury further by injecting dual sets of valuation data and opinion may make the task virtually impossible.

Either the second or fourth solution might conceivably reconcile the conflicting statutes in an acceptable fashion. (See *People ex rel. Dept. Pub. Wks. v. Lynbax, Inc.*, 253 Cal.App.2d 870 [62 Cal.Rptr. 320].) The record before us does not require that we choose between them. There is no issue raised on appeal con-

cerning the apportionment phase of the trial and the record indicates that phase of the proceedings has in effect been waived. Appellant Shell did not, in the trial court, seek to set aside the order requiring a single valuation trial pursuant to Code of Civil Procedure section 1246.1. It is, therefore, barred from raising the question on appeal.

Protective Order. Respondent filed its notice of motion to preserve the valuation date on December 21, 1966. The motion was heard on January 3, 1967. On that date, the court ordered the parties to submit points and authorities within a total of 20 days and that "upon receipt of all Briefs matter[s] will stand submitted." On January 5, two days after hearing on the motion, appellants Glouner noticed the deposition of the appraiser retained by respondent for the purpose of establishing that the delay in trial was caused by the failure of that appraiser to be prepared rather than their own failure to respond to interrogatories. The trial court granted a protective order against the taking of the deposition. Appellants Glouner contend that the order was erroneous and prevented them from establishing their position with respect to delay.

The contention lacks merit. The court had already concluded the hearing taking evidence on the motion to preserve the valuation date. Any evidence obtained on the deposition would thus have been valueless. Appellants Glouner were obligated at the time of hearing on the motion to inform the court of any evidence available to them which for one reason or another they could not produce and to seek a continuance of that hearing. They did not do so. They do not contend that they were precluded from calling the appraiser as a witness at the hearing. The evidence obtainable on

deposition, thus, could not have been used by appellants Glouner. Under these circumstances, the deposition would have been oppressive and dilatory.

Fair Trial. Trial in the case at bench commenced after a previous mistrial declared after approximately three weeks of hearing. There had been protracted pretrial maneuvering, almost all of it unsuccessful, by appellants Glouner. A number of judges had been disqualified by affidavits pursuant to Code of Civil Procedure section 170.6. An additional number of judges had felt themselves disqualified on their own motion. The record discloses that at an in-chambers conference prior to the commencement of trial, counsel for appellants Glouner began to bait the trial judge. Early in the conference he used the phrase ". . . if your honor intends to be as arbitrary as your statements indicate. . . ." When the judge asked in reference to a legal issue raised by Glouner's counsel, "Have you got any other case?", counsel replied, "Indeed I do, but look how long it took me to get you to ask me if I did." Counsel accused the trial judge of "approaching this case with an attitude toward the participation of counsel in the conduct of the trial that is going to rob my clients of the right to be heard. . . ." Our reading of the record indicates that the statements of counsel for appellants Glouner were without provocation and uncalled for. Counsel moved for a mistrial. Upon denial of that motion, he sought to reopen much of the matter determined by the pretrial orders citing, in support of his position, an unreported opinion.

The trial before the jury commenced. After several days of trial, the trial judge notified counsel that they should not argue questions of law with respect to ob-

jections in the presence of the jury, explaining that he was concerned from the past conduct of the trial that matter that was not properly evidence was being discussed in the jury's presence. The judge also indicated that on many objections he would not require argument.

The appraisal reports of the parties had been sealed by the judge conducting the pretrial because of a lack of comparability. While cross-examining a witness called by respondent, counsel for appellants Glouner asked: "Would you look at your appraisal report, the copy that I have been handed, which bears the initials of the judge pro tem. presiding at the pretrial conference, Richard Barry." The judge cautioned counsel, "Mr. Fadem, let's not interject unnecessary matters into your question." Counsel replied: "I am only trying to identify—" and the judge responded, "Now, we don't have to have that, Mr. Fadem." Counsel persisted and the court in the presence of the jury stated, "You are not going to interject anything more of that nonsense." Counsel, also in the presence of the jury, objected to the judge's use of the term "nonsense," stating it interfered with his effectiveness and was detrimental to his case. The court noted the objection and requested counsel to proceed. Undaunted, counsel demanded an apology, stating that his words were not nonsense "and were appropriate to the subject of the question." The trial judge stated, "Mr. Fadem, there will be a $25 fine right now." The court ordered a recess and the jury was excused. Before the jurors could leave, counsel stated: "I have not been in contempt of court, your Honor. I would point out that as your Honor left the bench your face was red, your voice was rising, and you were shouting at me for no reason whatsoever."

After a recess, the matter of counsel's contempt was discussed in chambers. At counsel's request, the judge postponed determination of the matter of contempt until the conclusion of the trial. Counsel for appellants Glouner sought a mistrial. He accused the court of unjudicious and arbitrary conduct and said: "Secondly, the Court is so obviously deeply emotionally distraught over this matter that the Court is incapable in the future, as it has been incapable in the just past, of conducting any kind of judicial proceeding." He in effect accused the trial judge of lying with respect to statements made by the judge regarding the demeanor of counsel in court. The trial judge took no further action on the contempt prior to reconvening the trial.

When the trial reconvened before the jury, the trial judge said to them in reference to the preceding incident in their presence: "Now, maybe I reacted too fast, too hastily. In fact, I, unfortunately used the word 'nonsense' with reference to a matter that counsel referred to. . . . I trust that because of our little disturbance here this morning you will not in any way be affected or prejudiced for or against the defendants Glouners in this case. . . ."

The second incident of which appellant Glouner complaint occurred about ten days later. The cross-examination by Glouner's counsel of respondent's appraiser had been long and tedious. It was characterized by many exchanges of sarcasm between the witness and counsel, and by a tendency of counsel to argue on objections to evidence in the presence of the jury after ruling on the objections even when the ruling was in his favor. Counsel persisted in repeating questions to which objections had been sustained. When counsel proceeded to cross-examine on a theory of trend in

values, the situation deteriorated further. Counsel had previously stated in the presence of the jury that it was his prerogative as the cross-examining attorney to ask that the reporter read questions previously asked and had taken exception to either opposing counsel or the judge asking that a question be reread. He asked a question bearing on the manner of determining trend in value to which an objection was interposed and overruled. The witness answered. Counsel then asked the witness, "Do you know what the last question asked you was, Mr. Miller." The witness answered, "Yes." Counsel then stated, "Would you tell us?" Counsel for respondent then asked the court, "May we have the question reread?" Counsel for appellants Glouner undertook to make the ruling on the request. He said, "No, I want to find out if the witness thought he was answering the question. I think it would be helpful to the jury's judging his crediability." The court stated, "Mr. Fadem, that last remark is unnecessary and uncalled for. Would the reporter read back the question, please?" Counsel replied, "Excuse me, your Honor, I would like to go on the record—" The court said, "Not in front of the jury, Mr. Fadem." Counsel replied, "Your Honor's comments to me were in front of the jury, and I think were uncalled for." The court then cited counsel for contempt. Counsel for appellants Glouner persisted in a demand that he then and there be permitted to argue his position with respect to the remark in the presence of the jury. He demanded an apology from the court. The judge again cited him for contempt for persisting in arguing the matter in the jury's presence. Counsel stated, "I would like to point out for the record that your Honor was raising his voice and pointing at me." He was again

cited for contempt. No request was made for an instruction to the jury to disregard the incident.

At the conclusion of the trial, the pending contempts of court against counsel for appellants Glouner were dropped.[2] Appellants Glouner assert on this appeal that they were denied a fair trial by misconduct of the trial court. We note at the outset that counsel's conduct, if not contemptuous, was at least reprehensible. He baited the trial judge in chambers and disparaged him without reason before the jury. Counsel refused to abide by the court's rulings and arrogated to himself the right to control aspects of the trial. We need not determine the issue of the propriety of the contempt citations, however, Our review of the record leads us to the conclusion that appellants Glouner were not prejudiced by anything that was done by the judge. The jury was instructed to disregard the use of the word "nonsense." The incidents of contempt were each initially of trivial impact and were emphasized only because counsel for appellants Glouner persisted in keeping the matters alive before the jury rather than permitting further argument outside of its presence. If any prejudice resulted to appellants Glouner it was the direct and sole result of conduct of the lawyer of their choice.

The judgment is affirmed. Appellants to recover costs.

CERTIFIED FOR NONPUBLICATION.

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[2]Appellants Glouner seemingly contend that the court erred in not following through with the contempt matters. We see no prejudice to them from the procedure followed.

APPENDIX B.

Excerpt From Petition for Hearing in the Supreme Court of California.

* * *

There are several statements at this point in the opinion (pp. 19-22) which lack support in the record:

> *Item:* "He [counsel] in effect accused the trial judge of lying with respect to statements made by the judge regarding the demeanor of counsel in court." (Opinion, p. 20)

In fact, what happened *in chambers* was that Judge Davis made disparaging remarks about counsel's "tone of voice" [RT 1566:12], whereupon this exchange transpired:

> The Court: * * * "It is too bad they don't put that on video tape.
>
> Mr. Fadem: As a matter of fact, we have it on tape, so that will be available in this case.
>
> The Court: I said video tape.
>
> Mr. Fadem: I am sorry, we don't have video tape, but we do have tape. If your Honor says my voice was raised, I ask the Court to impound the tape and maintain it, because the tape will show that the situation is different than your Honor says. It was your Honor who was yelling, and it was I who was quiet.
>
> Mr. Graves:[25] May the record now reflect I am not joining in the comments about which one was yelling and which wasn't, but I will join in counsel's motion, and hereby now move the Court that the Court order the tape of this morn-

[25]Mr. Graves represented the Glouner's trial counsel on the contempt matters in the Trial Court.

ing's proceedings, which I did not know existed until this moment, impounded as part of the record in this case. Will the Court so order?

The Court: I see no reason to.

Mr. Graves: Is your Honor refusing to grant the motion the tape be impounded?

The Court: Right; the Court makes an order of contempt by what appears to him at that particular time.

Mr. Graves: May I make a motion the Court impound that portion of the record in the Glouner case so it will be available on a possible appeal that might come up in the Glouner case?

The Court: I don't think I have the authority to. That is Miss Jankay's[26] personal property that she uses to assist her.

Mr. Graves: I will represent to the Court it is in the presence of the Court and the Court can order it impounded. It is relating to court proceedings and the Court has the power. Does your Honor seriously doubt his powers? May I suggest your Honor order it impounded and let the lady worry about whether the power exists.

Mr. Fadem: I would say this, your Honor, that since you chose to put on the record at great length I was yelling and your Honor was not, the tape will settle that issue, and if you want the truth to out rather than merely to protect your Honor's record, you will impound that tape. If you don't impound it, it will be clear that your Honor doesn't want the facts to reach a reviewing court."

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[26]Miss Jankay was the court reporter.

The foregoing, it is submitted, speaks for itself. The tape was eventually subpoenaed [CT 657] and fully bore out Mr. Fadem's contention. (For further discussion see Reply Brief of Appellants Glouner, pp. 16-17).

> *Item:* "The record discloses that at an in-chambers conference prior to the commencement of trial, counsel for appellants Glouner began to bait the trial judge. Early in the conference he used the phrase '. . . if your honor intends to be as arbitrary as your statements indicate. . . .' When the judge asked in reference to a legal issue raised by Glouners' counsel, 'Have you got any other case?', counsel replied, 'Indeed I do, but look how long it took me to get you to ask me if I did.' Counsel accused the trial judge of 'approaching this case with an attitude toward the participation of counsel, in the conduct of the trial that is going to rob my clients of the right to be heard. . . .' Our reading of the record indicates that the statements of counsel for appellants Glouner were without provocation and uncalled for. Counsel moved for a mistrial. Upon denial of that motion, he sought to reopen much of the matter determined by the pretrial orders citing, in support of his position, an unreported opinion."[27] (Opinion, p. 19).

The foregoing statement consists of a collage of partial quotes wrenched out of context. What actually

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[27]The unreported opinion referred to (*People v. Hull*, 2d Civ. 29159), happens to be the one and only case ever decided in California on the effect of a mistrial on the date of value provisions of C.C.P. §1249. It was decided by the very Court of Appeal that decided the instant case.

happened was this: On Friday, January 26, 1968, the case at bench was assigned to the trial department [CT 603]. All that transpired on that day was a brief unreported conference in chambers, roughly outlining the nature of the case. The trial court did not at that time have a chance to look over the file [RT 4:21-26]; no issues were presented, briefed, argued or submitted.

Nonetheless, on Monday morning, the trial court proceeded [after a few brief remarks about location of the subject property—RT 2-4] to issue a stream of rulings, without affording counsel any opportunity to be heard [RT 5:2-12]. When counsel asked for such opportunity, the trial judge responded:

> "The Court: What have you got to add? I don't want an argument on every ruling that I make here, you understand. Get that straight right now. [RT 5:15-17]."[28]

Counsel responded:

> "Mr. Fadem: I appreciate learning of it, but I would point out all we did on Friday was delineate the issues. There was no argument upon them, and I point out that the Court's assertion that Murata is controlling here is, in my view, not correct." [RT 5:18-22].

There ensued at this point a colloquy consuming some two pages of reporter's transcript [RT 5-7] in which the trial court repeatedly refused to hear counsel. The

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[28]While regrettably the cold record does not disclose the tone of voice, it is at the very least a fair inference, that this harsh choice of words—entirely unprovoked—was uttered in something less than a polite manner.

specific colloquy which led to the words repeated out of context by the Court of Appeal, was as follows:

> "Mr. Fadem: I want to point out, your Honor, that the right to trial includes the right for counsel to be heard. I have not been heard on these issues which you have cut me off on. Am I going to be heard on issues to be ruled on, or am I not?
>
> The Court: I don't think there is any need to argue a point that has been determined by the Supreme Court.
>
> Mr. Fadem: Your Honor won't even let me be heard whether it has or hasn't been argued. You said you know Murata, and that is it.
>
> The Court: *Have you got any other case?*
>
> Mr. Fadem: *Indeed I do, but look how long it took me to get you to ask me if I did.* I have a feeling your Honor is *approaching this with an attitude toward the participation of counsel in the conduct of the trial that is going to rob my clients of the right to be heard* on important issues, and there are important issues in this cases; . . ." [RT 7-18], (portions quoted in the opinion emphasized).

It is submitted that on this record the conclusion of the Court of Appeal that ". . . statements of counsel for appellants Glouner were without provocation and uncalled for", is itself without foundation, and constitutes an improper and unwarranted restraint on the freedom and *duty* of an advocate to present and espouse his client's cause.[29]

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[29] "[Counsel] has a right to press a legitimate argument and to protest an erroneous ruling." *Gallagher v. Municipal Court,*

(This footnote is continued on the next page)

—*Item:* The reference to ". . . many exchanges of sarcasm between the witness and counsel." (Opinion, p. 20).

There were two instances of sarcasm; both gratuitously injected by condemnor's witness, Miller [RT 2645: 18-19 and 2681:9-10]. The Glouners moved to strike one of Miller's smart-alecky responses, but the motion was erroneously denied [RT 2681:12].

—*Item:* The reference to ". . . . tendency of counsel to argue on objections to evidence in the presence of the jury after ruling on the objection even when the ruling was in his favor." (Opinion, p. 20).

In fact the Glouners' counsel was repeatedly not permitted to be heard on objections. In contrast, and notwithstanding the trial judge's pious statement that there were to be no arguments of law before the jury, condemnor's counsel were permitted time after time to make arguments of law, complete with citations to cases. [RT 401-402, 445, 493 *et seq.*, 1641, 1661, 1679, 1708, 2695-2698, 2741, 2751, 2816, 2844, 2846, 2866]. When the Glouners' counsel wished to make a record, he was silenced, and when he persisted he was held in contempt. [RT 2715:17-23]. When the Glouners' counsel objected to condemnor's counsel being permitted to argue law at length before the jury,

31 Cal. 2d 784, 796; "An advocate is at liberty when addressing the court in regular course to combat and contest strongly an adverse view of the judge or judges expressed on the cause during argument, to object and protest against any course which the judge may take and which the advocate thinks irregular or detrimental to the interest of his client . . ." *Ibid.*, at 795.

[RT 2866:25-2867:2], the trial judge responded: "He is making an objection" [RT 2867:3] and proceeded to entertain additional argument [RT 2868:21]. How in the face of such gross and overt partiality, the conduct of the Glouners' counsel can be castigated, and his clients deprived of their rights, is difficult to understand. Incidentally, while both counsel argued [or, in the case of the Glouners' counsel, tried to] against adverse rulings, there is nothing here to suggest that anyone argued against favorable rulings, the opinion notwithstanding.

> —*Item;* "Counsel had previously stated in the presence of the jury that it was his prerogative as the cross-examining attorney to ask that the reporter read questions previously asked and has taken exception to either opposing counsel or the judge asking that a question be re-read." (Opinion, p. 21).

This statement is unfounded.

> —*Item:* "Counsel persisted in repeating questions to which objections had been sustained." (Opinion, p. 20).

This statement is without foundation.

> —*Item:* "Appellants Glouner seemingly contend that the court erred in not following through with the contempt matters." (Opinion, p. 22, n. 2).

The Glouners contend no such thing. They do contend that:

> (a) the contempt holdings were utterly without justification,

(b) the contempt holdings were grossly prejudicial in that they deprived them of a fair trial and of due process of law,[30]

(c) error resulted from the trial judge's refusal to permit the Glouners' counsel to speak in his summation to the jury, of the events supposedly constituting contempt, and

(d) error resulted from the trial judge's failure to inform the jury that the improper contempts had been vacated. Perhaps this would have removed some of the prejudice. But surely it was error to let the jury think that the Glouners' counsel had been held in contempt whereas in fact he wasn't. The U.S. Supreme Court has repeatedly observed that even where a lawyer *is* guilty of contempt ". . . to pronounce him guilty of contempt is 'not unlikely to prejudice his client' *Sacher v. U.S.*, 343, US 1, 10, 99 L. Ed. 717, 724[]." *Mayberry supra,* at 539. How much greater the prejudice to the client, when the dramatic and repeated pronouncements of contempt are unfounded, and later vacated, but without informing the jury of the vacation.

* * *

[30]See *e.g. Peckham v. U.S.*, 210 F. 2d 693; *Lambert v. U.S.*, 101 F. 2d 960; *Offut v. U.S.*, 348 U.S. 11; *Sacher v. U.S.*, 343 U.S. 1, 10; *Mayberry v. Pennsylvania*, ... *U.S.* ...., 27 L. Ed. 2d 532, 539 [3].

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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1822~~ 70-278

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* THE DEPARTMENT OF PUBLIC WORKS,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One.

RESPONDENT'S BRIEF IN OPPOSITION.

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IN THE

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No. 1823

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

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vs.

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Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One.

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent opposes the Petition for Writ of Certiorari on the ground that the decision of the Court of Appeal of the State of California, Second Appellate District, Division One, on the fair trial issue is correct and involves no basis for review by this Court.

Question Presented.

Respondent takes issue with each specification of the question presented on Page 3 of Petitioners' brief. This will be amplified in Respondent's Supplemental Statement of the case.

In particular, Respondent objects to the statement in subparagraph (b) that "The contempt holdings are unjustified, and conceded to be such . . .". Respondent might well ask, "conceded by whom?" The trial court did not deem the first citation of contempt unjustified, for in connection therewith it had prepared a proposed "Findings and Order Re Contempt."[1] Respondent, in its brief below, conceded only that the trial court's use of the word "nonsense" was ill advised and that counsel's request for an apology was "perhaps" not enough to make a contempt. As to the second incident, Respondent in its brief below stated that the trial court properly rebuked counsel for trying to usurp its power to rule on requests that a question be re-read.

Supplemental Statement of the Case.

As stated by Petitioners, this was a six-week eminent domain trial following a previous mistrial. Judging from the length of the transcript excerpts, the contempt incidents consumed in all perhaps five minutes in open court, before the jury.

Mr. Fadem, trial counsel for Petitioners, was cited four times, but never adjudged in contempt within the meaning of Section 1211, *California Code of Civil Procedure.*[2]

---

[1]There is attached hereto as Appendix A the trial court's proposed "Findings and Order Re Contempt" which was included in the record below.

[2]Section 1211 CCP provides as to a direct contempt, "When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. . . ."

When the jury reconvened after the first incident, the trial court immediately admonished them as follows:

> ". . . Now, this morning, we had a certain issue of law that came up, and possibly in the heat of advocacy, counsel continued into his argument beyond what I thought was pertinent to the mere stating of that objection, and a matter that I felt should have been heard outside of the presence of the jury.
>
> Now, maybe I reacted too fast, too hastily. In fact, I, unfortunately, used the word 'nonsense' with reference to a matter that counsel referred to. In using that term, I was not referring to counsel's objection or to his testimony, but was referring to a legal matter that had been presented to a different department of this court at a time, oh, approximately a year or so ago. So I trust that because of our little disturbance here this morning you will not in any way be affected or prejudiced for or against the defendants Glouners in this case, and that we may proceed now with the remainder of the presentation of the testimony. . . ." [R.T. 1583:18-26, 1584:1-9.]

Three days after the second incident, Mr. Fadem filed a declaration to the effect that on March 4, 1968, the date of the triple citation, he had received an antitetanus shot and he "felt short tempered and unable to monitor [his] feelings with the effectiveness [he] normally maintains." [Cl. Tr. p. 682, lines 11-12.] Mr. Fadem also admitted feeling "flustered" that afternoon. [R.T. 2690:5-7.]

While Mr. Fadem was not permitted in summation to the jury to discuss the specific exchange of words be-

tween court and counsel giving rise to the citations, he was permitted full leeway in stating his lack of contumacious intent. As to the first citation, Mr. Fadem addressed the jury as follows:

> "I say to you I felt there was nothing that I said in those words to the witness [i.e. Mr. Fisher] that was a contempt of this Court. I say to you that I have a total and an abiding respect for the system of justice of our nation, and I take it very seriously each morning when the bailiff rises and says 'Face the flag which represents our constitution and freedom and justice for all', and I will talk more later about the role of that constitution in this kind of a case.
>
> "I say that those words that I just read, which led directly to the contempt within just a few lines, further were not intended by me to be a contempt because I feel no contempt, that I talk about this, you will recall, under the heading of this is the irrelevant, that which you must put aside. And I hope as earnestly as I can that you will follow the judge's instruction, and if there was anything that he did or said during this case which indicated where his sympathies or feelings lie, that those are to be disregarded.
>
> "Now back to some more irrelevancies." [R.T. 3038:9-26; 3039:1-2.]

Mr. Fadem's Petition for Writ of Review of the first incident was dismissed as moot, after a supplemental return informing the appellate court that the purported first order of contempt had been vacated and modified to show that Mr. Fadem was *cited* for contempt with further proceedings thereon continued. All the citations

were thus still pending for determination by the court after the jury had retired to deliberate on its verdict.[3]

The matters were finally heard in chambers and the court was persuaded by Mr. Graves to "vacate the previous orders and citation and contempt at this point, clear the record". [R.T. 3265:18-19; Cl. Tr. 685.] There was no request by either Mr. Fadem or Mr. Graves that the jury, which had not yet returned its verdict, be told of the ultimate disposition of the contempt citations.

The Contempt Citations, Being Trivial in Impact on the Jury and Non-Prejudicial in View of the Admonitions of the Court and Glouners' Counsel to Disregard Them, Did Not Deprive Petitioners of a Fair Trial.

Petitioners seize on the trial court's use of the words "teed off" during the hearing in chambers on the contempt citations. In context, the trial court was merely using the colloquialism for being provoked at Mr. Fadem's demand for an apology, which the court considered an unseemly request. In the portion of the record cited by petitioners [R.T. p. 3256], the trial court went on to explain:

> ". . . I might point out further that the court is an institution. It is not Lloyd Davis sitting up there on the bench. In other words, the Court is in no position to make an apology to any attorney, and for that reason, I think that the language that was used by Mr. Fadem exceeded that which was proper for an attorney, under the circumstances."

---

[3]Under California procedure a direct contempt may be treated summarily or the court may reserve jurisdiction to act. *In re Grossman*, 109 Cal. App. 625, 631-632.

The brief exchanges between court and counsel in the case at bar are, of course, not in the same category as the vicious insults hurled at the trial judge in *Mayberry v. Pennsylvania* (1971); .... U.S. ...., 27 L. Ed. 2d 532, or the continuous wrangle between court and counsel in *Offutt v. U. S.* (1954), 348 U.S. 11. In said cases, this Court concluded that because of the court's manifest personal involvement, the trial court in a case of contempt by personal attack upon him should call in another judge to try the contempt.

No such extreme and aggravated incidents occurred in the case at bar such as to cause the court to give vent to personal spleen or respond to a personal grievance. (*Offutt, supra,* 348 U.S. at 14.) Insofar as heard by the jury, what happened in the case at bar was, in the language of this Court, in *Offutt* "a rare flare-up . . . a show of evanescent irritation, a modicum of quick temper that must be allowed even judges . . ." *Offutt, supra,* 348 U.S. at 17). Mr. Fadem was hardly subjected to the abusive comments of the trial judge quoted by this court in the margin of its decision in *Offutt* (348 U.S. at 16-17).

That the trial court was neither emotionally nor personally involved in the case at bar is manifest by the fact that it was persuaded to dismiss all the citations on the strength of Mr. Graves' analysis of the first incident as "a misunderstanding where tempers became a little bit touchy and frustration tolerance is lost a little bit and, in fact, an unfortunate incident occurred which is *best now forgotten*. . . ." [R.T. 3262:20-24; emphasis added.]

The second incident was also analyzed by Mr. Fadem's counsel in the context of the anti-tetanus shot,

and the trial court was persuaded to dismiss those citations on the premise that Mr. Fadem himself was prepared to apologize for that incident. [R.T. 3265:8-15.] As mentioned, the trial court dismissed all the citations without requiring any apology. Petitioners now assert that "the jury had no opportunity to learn that the trial judge vacated the spurious contempts" (Petition, p. 11.) Respondent submits that it ill behooves petitioners to make this contention since counsel failed to avail themselves of that opportunity in the trial court.

Petitioners further argue that the conduct of Mr. Fadem in the case at bar "was appropriate advocacy directed at proper representation of Petitioners" and that "on appeal Respondent conceded as much" (Petition, p. 11.) Respondent has canvassed its briefs in vain for such a broad concession. In fact, Respondent characterized the nub of the problem as Mr. Fadem's persistence in vindicating his position before the court and jury. In its answer to the petition for hearing in the Supreme Court, Respondent pointed out that during the exchanges Mr. Fadem was not even arguing rulings on the merits of the case nor protesting the trial court's invasion of the fact-finding province of the jury, and that Mr. Fadem was rather attempting to justify his method of cross-examination.

Petitioners further assert the prejudice was "obvious." But this Court, like the lower courts, does not presume prejudice. After the first episode, the jury was admonished to disregard it, and during the second incident, the court likewise made it clear that the matter was of no concern to the jury. Of course, it was not, for the State trial court had the power to protect the process of orderly trial and to punish violations thereof as a contempt. (Section 1211, *California Code of*

Civil Procedure; In re Hallinan, 71 Cal. 2d 1179, 1180; *cf.* 18 U.S.C. §401.)

Petitioners ask rhetorically why, if their counsel's conduct was "reprehensible", the trial court did not adjudge Mr. Fadem in contempt and permit the contempts to be reviewed. This contention amounts to second guessing and a change of strategy on appeal regarding the contempt matters. The thrust of Mr. Graves' handling at the trial level of the contempts was (1) that the first incident should be forgotten by Court and counsel as a mutual misunderstanding and as an inconsequential flare-up (as indeed the Court of Appeal characterized it), and (2) that Mr. Fadem, due to the physical after-effects of the anti-tetanus shot, might have been at fault in the second incident and, subject to an apology for that incident, the Court should dismiss all the citations. This, of course, was precisely what transpired, except that the trial court required no apology.

Conclusion.

Petitioners have magnified incidents which the decision of the California Court of Appeal properly characterized as "of trivial impact" on the jury—if indeed said incidents had any impact. The subsequent events befalling the trial judge have utterly no relevance to his conduct in the case at bar. The trial court's conduct during the incidents complained of fully measured up to this court's pronouncement in *Offutt* that a trial judge should not "give vent to personal spleen or respond to a personal grievance" (348 U.S. at 14).

In the language quoted by Petitioners from this court's decision in *Sacher v. United States* (1952) 343 U.S. 1, this Court also stated:

> ". . . But it will not equate contempt with courage or insults with independence. It will also protect the process of orderly trial, which is the supreme object of the lawyer's calling."
>
> *Sacher, supra,* 343 U.S. at 13-14.

Respondent submits that Petitioners have shown no reasons for granting the Writ of Certiorari and accordingly their petition should be denied.

Respectfully submitted,

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APPENDIX "A."

Findings and Order Re Contempt.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiffs, vs. Donald C. Glouner, et al., Defendants. No. 879 771.

The above entitled action came on regularly for trial on Friday, January 26, 1968, before the Honorable Lloyd S. Davis, Judge presiding. Before the selection of the jury, the Court carefully reviewed the voluminous file in this matter and conferred with counsel in chambers with reference to the issues to be determined. From this preliminary review, it appeared that this was an action in eminent domain, brought on behalf of the Department of Public Works to acquire easements over or fee title to certain relatively small portions of a larger parcel of property owned by the Glouner family. It also appeared that the proceedings had been filed on March 2, 1966. However, because of what appeared to be delaying and harrassing tactics on the part of the attorneys for the Glouners, the action had not been brought to trial until July 6, 1967. These delaying tactics included: the filing of an answer which did not comply with the requirements of Section 1246 C.C.P., even though defendant's counsel who were well experienced in the field of eminent domain were presumably well acquainted with the provisions of that section; the filing of proceedings to vacate the order of immediate possession, even though the right of immediate possession is granted by Section 14 of Art. I of the State Constitution, and the validity of this provision was uphold in the early case of *Marblehead Land*

Co. v. Superior Court, 62 C.A. 408; and the filing of non-responsive answers to Interrogatories propounded by the State. The file also indicated that there had been controversies in the Pretrial proceedings as to the comparability of the appraised reports submitted by the respective sides, and that no order was made for the exchange of the reports. However, a standard form embodying the provisions of the Superior Court's Eminent Domain Policy Memorandum was attached to the First Pre-trial Order. In its Minute Order at the time of the Final Pre-trial Conference, the Court ruled:

> "It is implicit in the Court's pretrial orders that although each party is bound by the study set forth in each report, such a study is necessarily subject to adjustment and amendment at time of trial upon determination of whether there is a single larger parcel or two separate larger parcels."

After some further proceedings respecting the number of challenges permitted the defendants under Section 170.6 C.C.P., the case was brought to trial on July 6, 1967, before the Honorable Jerold E. Weil. This trial terminated in an order declaring a mistrial on July 31, 1967. From the Minute Orders for each day of trial, an inference could be drawn that the trial had proceeded very slowly, with constant interruptions for argument on questions of law.

In order to avoid a repetition of the events that apparently had caused the mistrial at the first trial, counsel were advised that the Court intended to maintain a firm control over the proceedings, and would permit argument only where reasonably necessary and in such a manner as would not interfere with the orderly prog-

ress of the trial. In particular, counsel were advised that arguments of matters of law were not to be held in front of the jury, but were to be heard either in chambers or at the bench. As the trial proceeded, again at a very slow pace, this procedure of hearing arguments outside the presence of the jury was adhered to except in a few instances where it was felt that a discussion of the legal basis of a ruling could be of assistance to the jury.

Among the legal issues raised from time to time was the effect of the First Pretrial Order on the admissibility of testimony to be given by the expert witnesses. It was apparent that the expert witnesses could not be limited literally to the language used in the original appraisal reports, since the testimony had to be adapted to conform to the rulings of the Court with respect to the determination as to whether there was one larger parcel or two larger parcels, and as to what elements of detriment could be included in forming an opinion as to the amount of severance damages. It was felt by the Court that any discussion as to the effect of the Pretrial Order could be of no assistance to the jury and could well be prejudicial if it were brought out that the testimony of a witness differed from the position taken in the appraisal report, even though such a variance in the testimony resulted from rulings made by the Court. The Court therefore anticipated that it would be necessary to make a ruling expeditiously, if there was any suggestion of an attempt by counsel to make reference to the Pretrial Order before the jury.

On Monday, February 19, 1968, counsel for the Glouners, Jerrold A. Fadem, commenced his cross-examination of the State's first expert witness, George L. Fisher.

Mr. Fadem commenced a question by stating:

"Q. Would you look at your appraisal report, the copy that I have been handed, which bears the initials of the judge pro tem presiding at the pretrial conference, Richard Berry?"

The Court, believing that any reference to the pretrial proceedings was clearly irrelevant to any matter that could properly be presented to the jury and that such a reference could be prejudicial, stated:

33373

"Mr. Fadem, let's not interject unnecessary matters into your question."

Mr. Fadem, instead of proceeding with a proper question, commenced to argue back to the Court, stating in a loud and belligerent voice:

"I am only trying to identify. . . ."

The Court then again cautioned Mr. Fadem, stating:

"Now, we don't have to have that, Mr. Fadem."

Again, Mr. Fadem instead of proceeding with proper questioning of the witness, interjected:

"I don't understand what has troubled the Court, but I. . . ."

The Court then proceeded to admonish the jury, stating:

"The jury is instructed to disregard anything about what happened at the pretrial conference."

Again, instead of proceeding with a proper question to the witness, Mr. Fadem continued to argue with the Court, stating:

"I made no. . . ."

The Court, for the purpose of terminating this argument which was being conducted in front of the jury, stated:

> "You are not going to interject anything more of that nonsense."

The word "nonsense", as used by the Court was intended to refer to the pretrial proceedings which were quite irrelevant to the matters to be considered by the jury.

Mr. Fadem apparently misunderstood the Court's reference, stating again in a loud voice:

> "I object to your Honor's characterizing whatever I have done as nonsense. I think that that is detrimental to my position in this courtroom. It interferes with my effectiveness in the presentation of the case."

The Court again attempted to terminate the argument by stating:

> "You interjected, Mr. Fadem. Now let's just ask questions."

Instead of complying with the Court's direction, Mr. Fadem continued to argue, stating in front of the jury in a loud and belligerent tone of voice:

> "Your Honor's referring to my words as nonsense, I ask the Court's apology for. My words were not nonsense, and were appropriate to the subject of the question."

In order to finally terminate this unproductive argument, it was necessary for the Court to cite counsel for contempt, recess the jury forty minutes ahead of time for the noon recess, and leave the bench.

Even after the Court had left the bench, and while some of the jurors were still present, Mr. Fadem continued:

> "I have not been in contempt of court, your Honor. I would point out that as your Honor left the bench your face was red, your voice was rising, and you were shouting at me for no reason whatsoever."

FINDINGS

The Court finds:

1. That the statements made by Mr. Jerrold A. Fadem to the Court on Monday, February 19, 1968, as recited above, constituted disorderly, contemptuous and insolent behavior toward the Judge while holding court, and interrupted the due course of the trial. (Section 1209, Sub. 1, C.C.P.)

Hallinan v. Superior Court, 74 C.A. 420.

In re Grossman, 109 C.A. 625.

In re Hallinan, 126 C.A. 121.

Rose v. Superior Court, 140 C.A. 419.

Gillen v. Municipal Court, 37 C.A.2d 428.

2. That the failure of Mr. Jerrold A. Fadem to desist from argument of matters of law in front of the jury and to proceed with the questioning of the witness, constituted the disobedience of a lawful order of the Court. (Section 1209, Sub. 5, C.C.P.)

Hallinan v. Superior Court, 74 C.A. 427.

Cantillon v. Superior Court, 150 C.A.2d 184.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED by this Court, that the said Jerrold A. Fadem, by reason of said acts, conduct

and statements, was and is guilty of direct contempt of the authority of this Court, committed in its presence on the 19th of February, 1968.

IT IS FURTHER ORDERED that the said Jerrold A. Fadem be punished for said contempt and that he is hereby fined the sum of Twenty-five dollars, and that he pay said sum of Twenty-five dollars, plus Ten dollars, assessment under Section 13521 Penal Code, to the Clerk of this Court.

Dated this .... day of March, 1968.

.....

Judge of the Superior Court

[Cl. Tr. 804-810]

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Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One.

REPLY BRIEF.

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On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One.

REPLY BRIEF.

Introduction.

Petitioners respectfully submit this Reply Brief because the Respondent's Brief displays a lamentable lack of candor with the Court, compelling a reply.

The Document Attached to the Respondent's Brief as Appendix A Is Spurious in That No Such "Findings" Were Ever Made by Any Court and Said Document Was Never Signed by Any Court.

The Court may have noted that the document appearing as Appendix A to the Respondent's Brief does not bear the Superior Court's "Filed" stamp and that it is undated and unsigned. This abortive document was

prepared by the trial judge, but on advice of counsel for the trial court in the writ proceeding[1] it was never signed or filed by the trial court.

The reason was that the proposed "findings" consisted in equal parts of lengthy, argumentative [and inaccurate] "justifications" for the holding of Mr. Fadem in contempt, which in fact had nothing whatsoever to do with the acts asserted to be contempt,[2] and of matters which were simply untrue. At pages 4-5 of Respondent's Appendix A the Court will observe quotations from the reporter's transcript liberally interspersed with the trial judge's characterizations, and repeated assertions that Mr. Fadem was using ". . . a loud and belligerent voice".

It so happened, however, that the court reporter was using a magnetic tape recorder in addition to her stenotype machine. In chambers, promptly after the purported contempt, Mr. Fadem requested that the magnetic tape be forthwith impounded so that reviewing Courts could have objective evidence in the writ proceedings, indicating whether the reference to "loud and belligerent" voice had any substance (See pp. 23-25 of Appendix B to Petition for Writ of Certiorari). The trial judge refused. Thereupon the magnetic tape was subpoenaed [Clk. Tr. 657]. After the magnetic tape was produced and heard by the trial court's counsel in the writ proceedings, it became quite obvious that Mr.

---

[1]This was the proceeding whereby Mr. Fadem sought review in the California Court of Appeal of the contempt order (See Petition for Writ of Certiorari, p. 8). Such writ proceeding is in the nature of a separate lawsuit, distinct from the controversy at bar. See *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14.

[2]*E.g.*, see the lengthy recitations dealing with law and motion matters relating back a year, and having no conceivable bearing on the direct contempt charged.

Fadem had not raised his voice, and that he was not in the least belligerent. Indeed the tape emphasized what the reporter's transcript quoted in the Petition for Certiorari (p. 4) already shows: that Mr. Fadem was not even permitted to complete a single sentence by the trial judge's outburst. Accordingly, the loud-and-belligerent-voice assertion was quietly abandoned, and the spurious "Findings And Order Re Contempt" were never signed or filed by the trial court. Respondent's present bland reliance on that abortive document, without a candid explanation of its background to this Court, eloquently attests to the disingenuous nature of Respondent's arguments.

Respondent's Assertion That Mr. Fadem ". . . Was Cited Four Times, but Never Adjudged in Contempt . . ." Is at Once a Misrepresentation of the Record and of the Law of California.

Nothing could be more unequivocal than the words of the trial court herein:

> "The Court: Mr. Fadem, there will be a $25 fine *right now*. . . . I *find* you in contempt of court." [Rep. Tr. 1549:17-20, emphasis added].

Nor can there be any cavil about the pertinent language fthe trial court's minute order of February 19, 1968:

> "* * *
>
> The Court *finds* Jerrold A. Fadem in direct contempt of Court *and assesses a fine* in the sum of $25.00 plus the penalty assessment of $10.00" [Clk. Tr. 650, emphasis added].

One cannot help being taken aback by Respondent's boldness in coming before this Court and in the face of that record asserting that "Mr. Fadem, trial counsel for

Petitioners was cited four times, but never adjudged in contempt within the meaning of Section 1211, California Code of Civil Procedure." (Resp. Br. p. 2).

Lest it be suggested to the Court that there is any merit in the semantic juggling of the phrases: *"found* in contempt" vs. "*adjudged* in contempt", Petitioners invite the Court's attention to the well settled California rule that when a trial court finds one in contempt and imposes a fine, the process of contempt adjudication is completed, rendering the trial court *functus officio. Blake v. Municipal Court,* 144 Cal. App. 2d 131, 135; 300 P. 2d 755. In other words, the order of contempt and imposition of the fine completes the adjudicatory process, and thereupon the order of contempt is "final and conclusive". Cal. Code Civ. Proc. § 1222 (Also see *Blake, supra*).

Nor is there merit in Respondent's equally semantics-laden argument that Petitioners' counsel was merely "cited" for contempt (Resp. Br. p. 2). The short answer is that there is no such procedure in California law. There is no such thing as being "cited" for *direct* contempt of court. It is the essence of *direct* contempt that the proscribed acts occur in the presence of the court which *eo instanti* acquires knowledge of them as they occur, and finds that they constitute contempt. Direct contempt proceedings are summary in character. *O'Laughlin v. Superior Court,* 155 Cal. App. 2d 415, 420, 318 P. 2d 71. Thus, one is either in direct contempt of court, or he is not.

It is only in cases of indirect contempt—contempt committed out of the presence of the court and thus unknown to the court when it occurs—that the purported contemnor may be ordered to show cause (Cal.

Code Civ. Proc. §1212) and to stand trial (Cal. Code Civ. Proc. §1217). The latter process (order to show cause) is sometimes colloquially referred to as being "cited" for contempt, and indeed the phrase "cited for contempt" has on occasion been carelessly injected into direct contempt proceedings. Such pseudo-legal colloquiallisms notwithstanding, the difference between direct and indirect contempt procedure is so basic and so well defined in California as to readily qualify for characterization as hornbook law. See *e.g.* the standard California legal encyclopedia: 12 Cal. Jur. 2d, Contempt, §§57, 58, pp. 78-79.

The manner in which the "citation" business crept into the case at bench bears noting as it makes for a sad comment on the state of mind of the trial judge. After Mr. Fadem had filed his petition for extraordinary writ in the California Court of Appeal it became obvious from the petition and papers filed in opposition thereto that the trial court had failed to comply with the statutory procedural safeguards (see Cal. Code Civ. Proc. §1211), spelling out the requisites of holding one in contempt. It was only then that the ingenious suggestion was made that the trial court didn't "find" Mr. Fadem in contempt but rather, "cited" Mr. Fadem.

But the minute order of February 18, 1968, was by then a part of the record and unequivocally showed that the trial court did "find" Mr. Fadem in contempt. And so, two weeks after the minute order of February 19, 1968, (quoted at p. 3, *supra*) was entered, the trial Judge caused another minute order to be entered [Clk. Tr. 680] seeking to blame his clerk for the fact that the minute order of February 19, 1968, recited that Mr. Fadem was "found" in contempt. The fact is, of course, that the clerk was absolutely

correct; he drew the minute order of February 19, 1968, to faithfully reflect the trial court's order as made from the bench. Rep. Tr. 1549:17-20, quoted at p. 3, *supra.*

Conclusion.

More distressing even than the lack of candor permeating the Respondent's Brief, is Respondent's bold attempt at asking this Court to accept the characterization of multiple unwarranted contempt holdings as "trivial". Respondent equivocates about the extent to which it concedes the lack of basis for any contempt holdings (Resp. Br. p. 2), but the cold fact remains that under any standard set by legal precedent or pragmatic courtroom experience, the acts of Petitioner's counsel *did not* constitute contempt.

Petitioners respectfully express here their fervent belief that our judicial system has not reached—and hopefully never will reach—a state where the conduct of proceedings in open court has so deteriorated that *four* unjustified contempt findings in a jury's presence can be tossed off as a "trivial" bagatelle. Due process rights of litigants are too previous to permit that. And if those due process rights are to be preserved, they must perforce rest on a basis more substantial than the temper of a concededly "teed off" trial judge who—as later events tragically demonstrated—held at best a tenuous grip on his faculties.

Relief by this Honorable Court, is plainly called for, and Petitioners respectfully pray that the Writ of Certiorari issue.

Respectfully submitted,

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